

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

MEE SOOK RADZINSKI,

Appellant,

vs.

JOHN DOE/JANE ROE as PERSONAL
REPRESENTATIVE of JENNIFER CARLSON,
a Minor, NANCY LEE CARLSON, ERIC STEVEN
CARLSON, DEBBIE SUE HERSHAFT
WEHRMEYER, and JACKLYN VANDERZWAAG,
Jointly and Severally,

Appellees.

Michigan Supreme Court
Case No. 122522

Court of Appeals
Case No. 233998

Lower Court
Case No. 00-025663-CZ

BRIEF ON APPEAL - APPELLANT

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

Neil H. Fink, Esq., P.C.
NEIL H. FINK (P 13430)
KIMBERLY W. STOUT (P 38588)
Attorneys for Appellant
185 Oakland Ave., Ste. 250
Birmingham, MI 48009
(248) 258-3181

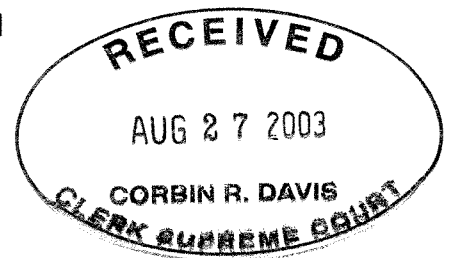


TABLE OF CONTENTS

Index of Authorities	ii - iii
Statement of the Basis for Jurisdiction and Identifying Order Appealed From	iv
Statement of the Question Involved	1
Statement of Facts	2
Argument	6
<p>THE DECISION OF THE MICHIGAN COURT OF APPEALS IN AFFIRMING THE TRIAL COURT'S DECISION GRANTING DEFENDANT- APPELLEES' MOTION FOR SUMMARY DISPOSITION UNDER MICHIGAN COURT RULE 2.116 (C) (10) WHERE A GENUINE ISSUE OF MATERIAL FACT EXISTED THEREBY FORMING A SUFFICIENT BASIS TO WARRANT A TRIAL ON THE MERITS WAS CLEARLY ERRONEOUS AND WILL CAUSE A MATERIAL INJUSTICE</p>	
Relief Requested	19
Proof of Service	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Atkinson vs. Farley</u> , 171 Mich. App. 784, 431 N.W.2d 95 (1988)	14
<u>Bonner vs. Chicago Title Ins. Co.</u> , 194 Mich. App. 462, 487 N.W.2d 807 (1992)	14
<u>Crescent City L.S.L. & S.H. Co. vs. Butchers' Union S.H. & L.S.L. Co.</u> 120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614 (1887)	11
<u>Haverbrush vs. Powelson</u> , 217 Mich. App. 228, 551 N.W.2d 206 (1996)	15
<u>Mathews vs. Blue Cross-Blue Shield of Michigan</u> , 456 Mich. 365, 572 N.W.2d 603 (1998)	10
<u>Renda vs. International Union, UAW</u> , 366 Mich. 58, 114 N.W.2d 343 (1962)	10
<u>Ritchie-Gamester vs. City of Berkley</u> , 461 Mich. 73, 597 N.W.2d 517 (1999)	6
<u>Smith vs. Globe Life Insurance Co.</u> , 460 Mich. 446, 597 N.W.2d 28 (1999)	17,18
<u>Spiek vs. Michigan Dept. of Transportation</u> , 456 Mich. 331, 572 N.W.2d 201 (1998)	6
<u>Vallance vs. Brewbaker</u> , 161 Mich. App. 642, 411 N.W.2d 808 (1987)	13
 <u>Other Authority</u>	
MCR 2.116 (C)(8)	3
MCR 2.116 (C)(10)	1,3,6,18

MCR 7.301(A)(2)	3
Restatement (Third) of Torts, Section 653	10

STATEMENT OF THE BASIS FOR JURISDICTION AND
IDENTIFYING ORDER APPEALED FROM

MCR 7.301(A)(2) provides that the Michigan Supreme Court may “review a case ... after decision by the Court of Appeals...[.]” Here, a final Order entered in the Oakland County Circuit Court granting summary disposition and dismissing Plaintiff-Appellant’s complaint on April 4, 2001. (APX. 700a)¹. The Michigan Court of Appeals affirmed in an unpublished opinion dated September 20, 2002. (APX. 702a). Plaintiff-Appellant appealed from the Order entered by the Michigan Court of Appeals on September 20, 2002 and filed a timely Application for Leave to Appeal with this Court on October 11, 2002. This Court granted Plaintiff-Appellant’s Application by Order entered on July 3, 2003. (APX. 705a). Plaintiff-Appellant now files this timely Brief.

¹ References to the Appellant’s Appendix will be referred to as (APX.) followed by the page number.

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the decision of the Michigan Court of Appeals in affirming the trial court's decision granting Defendant-Appellees' Motion for Summary Disposition under Michigan Court Rule 2.116 (C) (10) where a genuine issue of material fact exists thereby forming a sufficient basis to warrant a trial on the merits was clearly erroneous and will cause a material injustice?

Plaintiff-Appellant says: "Yes".

STATEMENT OF FACTS

Procedural History

The civil action which is the basis for the instant appeal was commenced on August 29, 2000 and arose out of a series of false allegations brought against the Plaintiff-Appellant Mee Sook Radzinski (a/k/a Sue Radzinski) by the Defendants-Appellees' Jennifer Carlson, Nancy Carlson and Eric Carlson both individually and collectively. Said allegations were originally made by the Defendants-Appellees' on or about March, 1999 in the form of a police report filed with the Oakland County Sheriff's Department. The report, initially made by Nancy Carlson, alleged that Sue Radzinski had sexually assaulted Nancy Carlson and Eric Carlson's daughter, Jennifer Carlson, in September of 1998.

Based upon the allegations, Sue Radzinski was charged with Criminal Sexual Conduct, 4th degree, and a jury trial was held before the Honorable Steven A. Andrews in the Oakland County Circuit Court, (Case No. 99-169406 FH). All three Defendants-Appellees' testified at the trial and the jury returned a verdict of not guilty in favor of Sue Radzinski. Following the verdict, Sue Radzinski instituted a civil action against the Defendants-Appellees' claiming malicious prosecution, conspiracy to commit malicious prosecution, abuse of process, intentional infliction of emotional distress, and conspiracy to inflict emotional distress.

Defendants-Appellees' answered the Complaint, and after a series of pleadings were filed, and the Defendants-Appellees' made a Motion for Summary Disposition

pursuant to MCR 2.116(C)(8) and (C)(10). (APX. 581a). The Motion for Summary Disposition was heard on March 21, 2001 before the Honorable Gene Schnelz, Oakland County Circuit Court. Judge Schnelz found that Sue Radzinski had met the requirements as stated under MCR 2.116(C) (8) but ruled in favor of the Defendant-Appellees' by finding that Sue Radzinski had failed to state a genuine issue of material fact pursuant to MCR 2.116(C)(10). (APX. 686a).

Following the dismissal of the action, Sue Radzinski filed a timely appeal in the Michigan Court of Appeals. The Court of Appeals affirmed the trial court's decision on September 20, 2002 in an unpublished opinion. (APX. 702a). Plaintiff-Appellant filed an Application for Leave to Appeal with this Court which was granted July 3, 2003. (APX. 705a).

Facts

The alleged incident of criminal sexual conduct which predicated the criminal trial of Sue Radzinski took place at Eagle/Ottawa Leather Company located in Rochester Hills, Michigan. At the time of the alleged assault, Sue Radzinski was employed at said company as was Eric Carlson. Nancy Carlson had formerly worked at Eagle/Ottawa, however, her employment had ended prior to the alleged incident. For reasons that will become relevant herein, it is crucial to note that Sue Radzinski's husband (Isaac Radzinski) not only worked at Eagle/Ottawa, but served in a management capacity.

Nancy Carlson testified at the preliminary hearing, held during the course of Sue

Radzinski's criminal trial before the Honorable Ralph H. Nelson of the 52 District Court (Case No. 99-003820 FY), that she was employed at Eagle/Ottawa from September, 1997 to October 26, 1998 when she stated that she was laid-off. (APX. 258a). However, Nancy Carlson was not laid-off, she was terminated as indicated by a termination/severance agreement executed between Eagle/Ottawa and Nancy Carlson. (APX. 619a) (Exhibit A of Plaintiff-Appellant's Answer to Motion for Summary Disposition). As the record sent on appeal indicates, Nancy Carlson's termination was the direct result of her inability to work with others in a professional manner as well as the fact that she was given to fits of rage which included the use of profanity during the course of her employment. (APX. 624a) (Exhibit B of Plaintiff-Appellant's Answer to Motion for Summary Disposition).

Following Nancy's termination for Eagle/Ottawa, she began to send what would become a series of Electronic Mail messages (E-Mails) to several individuals who were still employed at the company in which she begged for the chance to return to her former position at Eagle/Ottawa. (APX. 626a) (Exhibit C of Plaintiff- Appellant's Answer to Motion for Summary Disposition). However, Nancy Carlson's attempts to regain her employment were unsuccessful and an agreement was reached which resulted in the termination/severance agreement mentioned above.

In March of 1999, approximately six months after the alleged sexual misconduct occurred, and approximately 4 months after Nancy ceased her efforts to regain her employment, Nancy Carlson, her husband Eric, and their daughter Jennifer

filed a police report alleging that Sue Radzinski had fondled Jennifer Carlson's breasts during a visit to Eagle/Ottawa in September of 1998. As previously discussed, the allegation served to commence a criminal charge against Sue Radzinski wherein a jury found in her (Sue Radzinski) favor. Based upon conflicting statements made under oath by each of the Defendant-Appellees', Sue Radzinski sought redress through the above mentioned civil action.

ARGUMENT

The decision of the Michigan Court of Appeals in affirming the trial court's decision granting Defendant-Appellees' Motion for Summary Disposition under Michigan Court Rule 2.116 (C) (10) where a genuine issue of material fact existed thereby forming a sufficient basis to warrant a trial on the merits was clearly erroneous and will cause a material injustice.

Standard of Review

The Michigan Court of Appeals decision is reviewed de novo. See Spiek vs. Michigan Dept. of Transportation, 456 Mich. 331, 337, 572 N.W.2d 201 (1998).

Introduction

MCR 2.116(C)(10) provides that a motion for summary disposition may be granted as a matter of law when there is no genuine issue as to any material fact. In deciding a motion pursuant to subrule (C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. Ritchie - Gamester vs. City of Berkley, 461 Mich. 73, 76, 597 N.W.2d 517, 519 (1999).

Plaintiff-Appellant did present such evidence to survive Defendants-Appellees' Motion for Summary Disposition in the pleadings, the preliminary examination testimony, and other documentary exhibits including e-mails. (APX. 619a-652a) (Exhibits attached to Plaintiff-Appellant's Answer to Motion for Summary Deposition).

The pleadings point to utter and complete inconsistencies between the testimony given by each Defendant-Appellee. As further discussed below, such inconsistent statements could lead a reasonable mind to question the veracity of said testimony thereby leading the way to an inference that such testimony was not only untruthful, but deliberately so. The pleadings recount repeated instances of inconsistencies which serve to establish genuine issues of material fact that should be determined by a trial on the merits.

Defendant-Appellees' Testimony

The testimony of the Defendants-Appellees', when viewed in its entirety, is replete with inconsistent statements wherein they contradict not only themselves independently, but also contradict the statements of each other. In all, there were approximately 55 separate instances of contradictory statements made by the Defendants-Appellees' during the Preliminary Exam testimony alone. (APX. 637a) (Exhibit H of Plaintiff-Appellant's Answer to Motion for Summary Disposition). However, for the purposes of brevity, the discussion below will focus on the major areas of inconsistency which serve to establish a basis for Sue Radzinski's civil claims.

Nancy Carlson testified under oath that she witnessed Sue Radzinski fondle Jennifer Carlson in an inappropriate manner in early September of 1998 while she (Nancy) stood approximately 18 inches away and made no attempt to stop the alleged assault. (APX. 301a - 303a). Nancy then testified that she chose not to report the incident at the time it allegedly occurred because she was afraid that such action

would result in her losing her job. (APX. 261a). However, this statement is directly contradicted by an E-Mail message authored by Nancy Carlson in April of 1998 in which she voluntarily quit her job at Eagle/Ottawa. (APX. 632a) (Exhibit F of Plaintiff-Appellant's Answer to Motion for Summary Disposition). Clearly, the existence of this E-Mail serves to cast considerable doubt not only on Nancy's statements that she feared for her job, but also on her motivation for waiting six months to report such a heinous crime allegedly inflicted upon her daughter.

Nancy further testified that another reason she failed to report the alleged incident until six months later is that her husband, Eric Carlson, did not want her to report the incident. (APX. 274a). Again, this is contradicted by Eric's own sworn testimony that he never told Nancy Carlson not to make a report. (APX. 389a).

Furthermore, the inconsistencies continue on with the testimony of Jennifer Carlson who contradicts Nancy Carlson's testimony as to the actual occurrence of the alleged sexual misconduct at least five times. (APX. 637a) (Exhibit H of Plaintiff-Appellant's Answer to Motion for Summary Disposition). Clearly, the amount of contradictions is not indicative of truthful and candid testimony and a jury could reasonably find that the Defendants-Appellees' testimony is not credible.

Sue Radzinski's Civil Complaint

Sue Radzinski alleged several causes of action in her complaint against the Defendants-Appellees' including malicious prosecution, conspiracy to commit malicious prosecution, abuse of process, intentional infliction of emotional distress,

conspiracy to inflict emotional distress, and exemplary damages. Each cause of action was predicated upon two established facts: 1) the Defendant-Appellees' contradictory testimony as to crucial evidence in the criminal trial, and 2) the return of a not guilty verdict in Sue Radzinski's favor. The fact that a jury of Sue Radzinski's peers found her not guilty beyond a reasonable doubt is a strong inference that the members of the jury did not find the Defendant-Appellees' to be credible in their sworn statements.

The question remains, as to the motivation of the Defendant-Appellees' in lodging a criminal complaint against Sue Radzinski if the alleged act never in fact took place. While an attempt to answer such a question will never be possible by any individual other than the Defendant-Appellees', the facts adduced at trial, as well as the Exhibits contained in Sue Radzinski's pleadings submitted to the lower court, establish a credible theory as to what prompted said criminal proceedings while also serving to create a material issue of fact that Sue Radzinski is entitled to have heard by a jury.

Malicious Prosecution

To establish the cause of action for the tort of malicious prosecution, four elements must be established. First, the Defendant must initiate a prosecution against another. Second, the termination of the criminal proceeding must be in favor of the person who was prosecuted. Third, the absence of probable cause for initiating or continuing the proceeding must be established, and finally, the proceeding must have been initiated or continued with malice or a primary purpose other than to bring the

offender to justice. Mathews vs. Blue Cross-Blue Shield, 456 Mich. 365, 378, 572 N.W.2d 603 (1998).

Although the ultimate decision to prosecute lies within the sole discretion of the Prosecutor, common law principles dictate that a person who supplies information to a prosecuting attorney is not himself the prosecutor unless *he knows the information he is supplying is false* or unless he exerts improper influence upon the prosecuting attorney. Restatement (Third) of Torts, Section 653, p.386-387 (emphasis added). While this principle is derived from the common law, it has also been upheld by the Michigan Supreme Court.² Thus, while the decision to carry forward with the criminal prosecution of Sue Radzinski was not made by the Defendant-Appellees', the Prosecutor initiated the prosecution upon the belief that the information received from the Defendant-Appellees' regarding the alleged incident of sexual assault was accurate.

The Court of Appeals affirmed the trial court's decision to dismiss the malicious prosecution claim because the court found that there was no evidence to indicate that the criminal prosecution was initiated upon anything other than the sole discretion of the prosecutor acting upon independent investigation. (APX. 703a). However, nothing could be further from the truth. Defendants knowingly made false statements to institute the charges against Sue Radzinski, and as such, they are liable for her

² See Renda vs. International Union, et al, 366 Mich. 58, 83, 114 N.W.2d 343 (1962).

resulting prosecution. The fact that Elizabeth Paul (an employee of the Oakland County Psychological Clinic) and Richard Ribant (of the Family Independence Agency) referred the matter to the Oakland County Sheriff's Department is irrelevant. Not only were they operating upon the false statements of each Defendant, the Defendants themselves filed written statements with the police thereby encouraging the resulting prosecution independent of the acts of either Ms. Paul or Mr. Ribant. The argument offered by Defendant-Appellees that the filing of the charges against Sue Radzinski was "out of their hands", neglects to mention that the filing of said charges was completely predicated upon the Defendant-Appellees perjured statements. The Defendant-Appellees' argument collapses in the face of the fact that who actually made the initial report is immaterial - the issue is who supplied the false information which was in turn given to the authorities. The original supplier of the false statements and outright lies were the Defendants, and as such they are liable.

The second element of malicious prosecution is the established probable cause. The Defendant-Appellees' contend that the element of probable cause was established by the District Court in its decision to bind Sue Radzinski over for trial. However, it is almost universally held that a prior judgment or decree which was obtained against the Malicious Prosecution plaintiff by fraud, perjury, or other means does not establish probable cause for bringing the former action. See Crescent City L.S.L. & S.H. Co. vs. Butchers' Union S.H. & L.S.L. Co., 120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614 (1887) (fraud in procuring judgment detracts from its force as probable cause). The

probable cause established by the District Court's decision to bind Sue Radzinski over for trial on the charge of Criminal Sexual Conduct, 4th Degree, was predicated upon the testimony of the Defendant-Appellees' that, as previously stated, was replete with over 50 separate instances of contradiction. Such a vast number of inconsistent statements serve to establish a prima facie case that the Defendant-Appellees' engaged in offering knowingly false statements under oath. Thus, probable cause derived through perjured testimony ceases to be probable cause at all.

The tort of malicious prosecution also requires the proceeding to terminate in favor of the individual who was prosecuted. The jury's verdict of not guilty serves to establish this element of the tort.

Finally, the prosecution must be initiated or continued on with malice or with a primary purpose other than bringing the offender to justice. Again the Exhibits submitted to the lower court serve to establish a credible theory that the motivation of the Defendant-Appellees' in filing a complaint against Sue Radzinski had nothing to do with any traditional concept of justice. (APX. 619a - 652a).

Sue Radzinski's Answer to the Motion for Summary Disposition contained evidence sufficient to raise a genuine issue of material fact - namely the motivation of the Defendant-Appellees'. The proofs show that Nancy Carlson was extremely angry at the termination of her employment at Eagle/Ottawa and desperately wanted to become reinstated. When her numerous attempts at reinstatement failed, she began to discuss her feelings of unjust persecution at the hands of Eagle/Ottawa

management. (APX. 632a). Such management consisted of Isaac Radzinski (Sue Radzinski's husband) who served in the capacity as Vice President. Interestingly enough, it wasn't until several attempts at re-employment failed that Nancy Carlson decided to report the alleged sexual assault upon her daughter. This, coupled with the fact that it appears she desperately wanted to return to work at a company where an employee had assaulted her daughter, would leave reasonable minds with a healthy suspicion as to Nancy Carlson's motivation and veracity.

Abuse of Process

An abuse of process claim must establish an improper ulterior motive which is demonstrated by a corroborating act. Thus, the mere harboring of bad motives is not sufficient to uphold a claim of abuse of process. See Vallance vs. Brewbaker, 161 Mich. App. 642, 646, 411 N.W.2d, 808, 810 (1987). Sue Radzinski contends that the evidence submitted in the pleadings serves to form the basis for the reasonable inference that the Defendant-Appellees' not only harbored bad motives toward Sue Radzinski, but such motives were the catalyst for pursuing a criminal action.

During Nancy Carlson's employment at Eagle/Ottawa, she indicated to several employees that she felt she was being harassed. Not only did she feel that she was the subject of unjust harassment, she felt that "God has sent us here (Eagle/Ottawa) for a reason and I believe in my heart it is to expose the evil here...[.]". (APX. 648a). It is highly plausible that Nancy Carlson's self-imposed duty of eradicating the "evil" at the company where she was employed provided the motivation to seek her own

brand of justice. Thus, while bad motives alone cannot establish a claim of abuse of process, the Michigan Court of Appeals has described a meritorious claim of abuse of process as a situation where a Defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. Bonner vs. Chicago Title Ins. Co, 194 Mich. App. 462, 471, 487 N.W.2d 807, 812 (1992). Coincidentally, or perhaps not, Nancy Carlson entered into a contingent fee agreement on March 13, 1999 wherein she alleged a cause of action for injuries suffered during the course of her employment. (APX.650a). It is worth mentioning that a criminal conviction against an employee of Eagle/Ottawa would have placed Nancy Carlson in a significantly better position at the time of the institution of any civil claim against her former employer. While the existence of the contingent fee agreement does not in itself prove the existence of a collateral purpose, it certainly suggests its existence.

The Court of Appeals dismisses Plaintiff-Appellant's Abuse of Process Claim stating that Plaintiff-Appellant presents no corroboration for her claim that Defendant-Appellee's had an ulterior purpose. This disregards the exhibits Plaintiff-Appellant submitted with her answer to her Motion for Summary Disposition.

Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: 1) extreme and outrageous conduct, 2) intent or recklessness, 3) causation, and 4) severe emotional distress. See Atkinson vs. Farley, 171 Mich. App. 784, 431 N.W.2d 95 (1988). The criminal prosecution instituted by the Defendant-Appellees'

complaint served to damage Sue Radzinski by forcing her to endure the unbearable and unimaginable embarrassment and shame associated with such a heinous accusation. Such allegations were so vile that they should be considered repugnant in a civilized society. Not only was Sue Radzinski forced to answer to a charge that she sexually assaulted a minor, such allegations were made public in the form of a newspaper article which was distributed to the community at large. (APX. 635a). The fact that she was found not guilty did not serve to eradicate her intense feelings of humiliation; the verdict merely substantiates her claim that she was knowingly and falsely accused.

The Michigan Court of Appeals in Haverbrush vs. Powelson, 217 Mich. App. 228, 551 N.W.2d 206 (1996), held that the plaintiff had established a claim for intentional infliction of emotional distress where the defendant had sent the plaintiff threatening letters, put an axe and a hatchet on the plaintiff's car, and planted lingerie at the plaintiff's residence. Id. at 230. In Haverbrush, the actions of the defendant were undoubtedly unnerving to the plaintiff and served to create intentional distress in the plaintiff's life. In the instant case, the Defendant-Appellees' not only knowingly and intentionally made false allegations against Sue Radzinski in an attempt to seek retribution against the management of Eagle/Ottawa, namely Isaac Radzinski and his wife Sue Radzinski, but such patently untrue allegations were disseminated to the public at large. Surely, if the "private" harassment found to have occurred in Haverbrush meets the standard necessary to make a claim of intentional infliction of

emotional distress, then it stands to reason that the public humiliation suffered by Sue Radzinski as the result of the Defendant-Appellees' quest for revenge surely meet the requisite standard.

The Court of Appeals dismissed Plaintiff-Appellant's intentional infliction of emotional distress claim finding as follows:

Defendants' actions of reporting alleged instances of criminal sexual conduct at the direction of a treating psychologist/social worker, the Family Independence Agency, the sheriff's department and the prosecutor's office do not meet the standards set forth above, and plaintiff has otherwise failed to present any evidence of extreme and outrageous conduct sufficient to sustain her claim.

APX. 704a.

The Michigan Court of Appeals ignores the facts here that the Plaintiff-Appellant here was publicly humiliated in court and in the media, and forced to face unfounded vile criminal charges. The Defendant-Appellees conduct goes beyond merely reporting information to state agencies. Rather, the Defendant-Appellees' intentionally publicly levied heinous allegations against Plaintiff-Appellant that will haunt her the rest of her life.

Conspiracy

Plaintiff-Appellant Sue Radzinski's inclusion of conspiracy within her civil complaint is based upon two separate claims. First, Sue Radzinski alleges that the Defendant-Appellees' conspired to maliciously prosecute Sue Radzinski as is evidenced by their collusionary testimony. Likewise, such testimony also indicates a conspiracy

to intentionally inflict emotional distress. That is, each Defendant-Appellee gave sworn testimony implicating Sue Radzinski in a sexual assault and while they were unable to present a single consistent version of the facts they alleged, the fact that they each knowingly and voluntarily participated in the criminal prosecution warrants a claim of conspiracy.

Summary Disposition under MCR 2.116 (C) (10) - Conclusion

In Smith vs. Globe Life Insurance Co., 460 Mich. 446, 597 N.W.2d 28 (1999), the Court held that under MCR 2.116(C)(10) the moving party has the burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Id. at 455. The non-moving party must go beyond the pleadings to set forth specific facts showing a genuine issue of fact exists.

The Defendant-Appellees' Motion for Summary Disposition included no factual support other than an excerpt from the deposition of the Officer in Charge of the criminal investigation, Officer Travis Dick. Said excerpt indicated that Officer Dick would not have continued the investigation if he felt that the Carlson's were being untruthful regarding the alleged sexual assault upon their daughter. This support for the Defendant-Appellees' Motion for Summary Disposition is not sufficient to warrant the granting of a Motion for Summary Disposition where the factual support provided by Sue Radzinski is equally compelling and far greater in number and substance.

Plaintiff-Appellant Sue Radzinski has provided independent evidence in the form

of E-Mails written by Nancy Carlson, as well as a series of inconsistent statements made by each Defendant-Appellant, that the motivation for the criminal charge brought against Sue Radzinski was based upon a rationale other than bringing an offender to justice. Sue Radzinski has also demonstrated that Nancy Carlson was terminated from her position at Eagle/Ottawa, repeatedly begged for the chance to return to her employment, and then reported the alleged sexual assault nearly six months after it occurred. When questioned as to why Nancy Carlson elected to wait six months to report a sexual assault on her child (an assault which she claimed to witness yet did nothing to stop) she testified that she feared retaliation in the form of losing her job. Again, this testimony is contradicted by Nancy Carlson herself in the form of an E-Mail sent by Nancy Carlson where she voluntarily quits the very position she was so afraid of losing. This evidence, coupled with her belief that she was sent to Eagle/Ottawa to eliminate the "evil" within the company points to a motivation for making a criminal complaint against Sue Radzinski that is anything but pure. Thus, Plaintiff-Appellant met her burden under Smith vs. Globe Life Insurance Co., supra.

Sue Radzinski was forced to endure public humiliation and pain by answering to charges promulgated by the Defendant-Appellees' that were of an extremely heinous nature. When the charges were heard by the jury in Sue Radzinski's criminal trial said jurors were unable, based upon the testimony of the Defendant-Appellants, to return a verdict other than not guilty. The civil action that followed the acquittal contained within its pleadings several compelling pieces of evidence that could lead

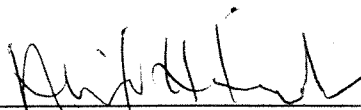
reasonable minds to differ as to the motivation and veracity of the Defendant-Appellees' testimony in the criminal case. The Motion for Summary Disposition made by the Defendant-Appellees' and granted by the lower court was premature and granted irrespective of the fact that the Motion contained virtually no factual support. Conversely, Plaintiff-Appellant's Answer to the Motion contained numerous proofs providing a sufficient basis for the claims made by Sue Radzinski against the Defendant-Appellees. As such, the Motion for Summary Disposition was erroneously granted.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant requests that this Honorable Court reverse the Michigan Court of Appeals' clearly erroneous decision affirming the trial court's ruling granting Defendant-Appellees' Motion for Summary Disposition and remand this case to the trial court for further proceedings.

Respectfully submitted,

Neil H. Fink, Esq., P.C.



NEIL H. FINK (P 13430)
KIMBERLY W. STOUT (P 38588)
Attorneys for Appellant
185 Oakland Ave., Ste. 250
Birmingham, MI 48009
(248) 258-3181

Dated: August 26, 2003.